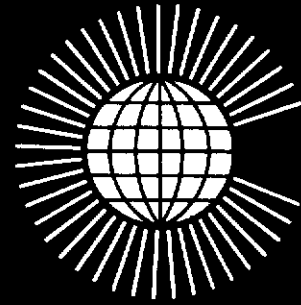


Commonwealth Legal Assistance News



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ARTICLES

Extradition and the European Union, Article appearing in *International and Comparative Law Quarterly*, Vol. 46, October 1997, page 948, by M. Mackerel and S. Nash, edited by C. Warbrick and D. McGoldrick

This article deals with the conclusion of two new conventions to simplify and improve extradition procedures between member countries of the European Union. The 1995 convention dealt with consent extradition while the 1996 convention deals with cases where the fugitive contests surrender. The aim of the article is to consider whether the new procedures have shifted the balance between judicial co-operation and the fight against crime "too far in favour of law enforcement at the expense of fundamental legal protections".

The authors commence with an examination of the extradition process and cover the issues of dual criminality, the submission of evidence in support of the request and the traditional protections enshrined in the right of the requested state to refuse extradition.

Having considered the general principles of extradition the authors consider the 1995 Convention on Simplified Extradition Procedure (the "1995 Convention") which supplements the 1957 Council of Europe Convention on Extradition and its two protocols. The article outlines the 1995 Convention's simplified procedures which is described as operating either when a request for provisional arrest is received or, if the Schengen Agreement applies, when a person is reported in the Schengen information system. (Schengen Convention 1990, Article 96). Once these and other relevant provisions of the principal convention have been satisfied the requested state and the fugitive must receive sufficient information to enable them to consider the issue of consent. The fugitive must have access to legal representation because consent (and the possible waiver of specialty) cannot be withdrawn. Once consent is signalled a formal request for extradition must be submitted within ten days and is considered by the requested state.

The authors' consideration of the 1996 Convention (which is also intended to supplement the 1957 Convention) deals with the substantive changes to traditional extradition procedures and to the definition of extraditable offences. Among the issues considered in the article are the change to the requirement of matching minimum punishability in both requesting and requested states and the way in which problems surrounding extradition for offences involving conspiracy are dealt with in the 1996 Convention.

Other significant changes considered by the authors include the change to the political offence exception which is effectively abolished but states parties to the 1996 Convention may enter a reservation to the provision in Article 5(1) that "no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence with political motives". The permissible reservation allows a state party to declare that only offences referred to in Article 1 and 2 of the European Convention on the Suppression of Terrorism will not be regarded as political offences. The authors deal also with changes to the right to refuse to surrender on the ground that the offence for which extradition is sought is a fiscal offence.

The right of the fugitive to waive speciality in certain cases is suggested by the authors to "reflect a change in the status of individuals within the extradition process". The article concludes that the 1996 Convention removes or reduces restrictions on the return of the fugitive offender. It questions whether the developments will reduce to an unacceptable level the procedural guarantees that provide the fugitive with adequate protection. The issue for consideration, the authors suggest, is whether the preamble to the 1996 Convention which notes that all the systems of government of the member States are based on democratic principles and comply with obligations laid down by the European Convention on Human Rights are sufficiently reflected in the text where there is no express obligation to ensure that the new procedures conform to the human rights commitments found in the European Convention on Human Rights or the International Covenant on Civil and Political Rights.

Extradition and the Death Penalty - Comment on Venezia v Ministero di Grazia e Giustizia. Judgment No. 223. 79 Rivista di Diritto Internazionale 815 (1996), Italian Constitutional Court, June 27, 1996, by Andrea Bianchi, University of Siena, [1997] The American Journal of International Law, Vol.91, pages 727-733

This article outlines the decision of the Italian Constitutional Court in an extradition case where the United States sought the surrender of Venezia for the offence of murder which carried the death penalty in Florida (the US state at whose request the extradition request was made.)

The extradition treaty between Italy and the USA contains the usual death penalty exception:

"when the offence for which extradition is requested is punishable by death under the laws of the requesting Party, extradition shall be refused, unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed."

The appellant argues that Article 698 of the Code of Criminal Procedure and the Act implementing the US/Italy treaty violate provisions of the Italian Constitution which protect fundamental human rights and prohibit the death penalty.

Evidence before the lower courts in Italy had included evidence that international treaties form part of the supreme law of the United States and prevail over conflicting state laws. The same evidence was rejected by the Constitutional Court which stated that the Constitutional protections cannot be made to depend on the discretion of public authorities who, on a case-by-case basis would have to decide whether assurances of a foreign government were effective and reliable. In the event the Court held that the prohibition on the death penalty in the Italian Constitution is absolute and precludes extradition for a capital offence on the basis of an evaluation by government officials or the courts of the sufficiency of assurances from the requesting state that the death penalty will not be imposed in that case.

This article examines the ramifications of this decision and asks whether the Constitutional Court has totally ruled out the extradition of fugitives charged with crimes punishable by death under the domestic law of the requesting State. The writer believes that the answer is probably "no" provided that extradition treaties deal differently with the death penalty issue. An example of what may be a permissible provision is found by the author in the Italy/Morocco treaty which requires the requesting state, in death penalty cases, to substitute the penalty provided for the same offence under Italian law.

Having dealt with the Venezia case the author deals with the reasoning of the court and concludes that it was based wholly on considerations of constitutional law, without any mention of relevant international instruments and that had the Constitutional Court considered the international law issues, it would have confronted a potential conflict between different treaty requirements. The question raised is whether obligations under the European Human Rights Convention prevail over the treaty obligations in light of the special character of the Convention, or on the basis of the rather special character of human rights treaties vis-à-vis other treaties.

In conclusion, the author points out that refusal to extradite by Italy in the name of a Constitutional principle that imposes an absolute prohibition on the death penalty, when combined with the later prosecution of the fugitive in Italy, can be seen as a means to "reconcile the needs of international judicial co-operation with the Constitutional tradition of the forum state." She also concludes that a pattern seems to be emerging from recent case law indicating the existence of a European *ordre public*, which prohibits extradition whenever this might involve a violation of values entrenched in either the European Convention or Constitutional provisions of the forum State.

CASE NOTES

Extradition - criminal procedure - habeas corpus - meaning of the word "offence" - Backing of Warrants (Republic of Ireland) Act 1965 U.K. (the "1965 Act")

The applicant applied for a writ of habeas corpus to be issued against the Governor of Belmarsh Prison and the Government of the Republic of Ireland, following a magistrate's order under s. 2(2) of the 1965 Act.

Section 2 of the 1965 Act, as amended, provides:

"(1) So soon as is practicable after a person is arrested under a warrant endorsed in accordance with section 1 of this Act, he shall be brought before a magistrates' court and the court shall..... order him to be delivered at some convenient point of

departure from the United Kingdom into the custody of a member of the police force.....of the Republic.....

(2) An order shall not be made under subsection (1) of this section if it appears to the court that the offence specified in the warrant does not correspond with any offence under the law of the part of the United Kingdom in which the court acts which is an indictable offence or is punishable on summary conviction with imprisonment for six months....."

Counsel for the applicant submitted that "offence" should be construed to mean conduct which was alleged and then see whether it would add up to a corresponding indictable offence specified in the warrant. Counsel for the Governor and the Republic submitted that the relevant words in the 1965 Act meant that the magistrate had to look for correspondence with an offence under English law from the terms of the Irish warrant.

Held, refusing the application:

1. Section 2(2) of the 1965 Act required a magistrate to be satisfied only that the offence revealed in warrant amounted to a sufficiently serious offence under U.K. law before he could order the delivery of an accused to the Irish authorities. He was not to receive evidence whether the conduct of the accused amounted to an offence in the U.K.

2. The court was limited to a study of the warrant itself when determining "the offence specified in the warrant." However the warrant was drawn, that was what the court had to look at. No other material could be adduced to determine "the offence specified in the warrant." A warrant with short particulars would specify conduct but the conduct was not to be derived from external material or evidence.

3. Exceptionally evidence could be admissible for the strictly limited purpose of explaining technical language in the warrant or words which an English court would not otherwise understand. However, such evidence would not extend to explaining the legal components in Irish law of any label given to the offence in the warrant.

4. The use of the word "any" in s. 2(2) indicated that the court ought not to look for an English offence which was identical with the offence specified in the warrant nor one whose juristic elements were the same.

R v Governor of Belmarsh Prison and Another, Ex parte Gilligan, The Times, January 20 1998

Extradition - sufficiency of evidence - evidence capable of supporting an hypothesis consistent with innocence

Singapore sought from Australia the extradition of the appellant to face charges of abetment to cheat, an offence under s.420 of the Penal Code of Singapore. The Magistrate determined that the appellant was eligible for surrender and the applicant appealed on the ground that some of the evidence submitted in support of the request for extradition permitted an hypothesis consistent with innocence, namely that the appellant was himself a victim of conspiracy.

Held dismissing the appeal:

The circumstances provide ground for an inference that the appellant was both personally involved in the arrangements for the discounting of forged bills of exchange, and also knowingly involved. Possibly a tribunal trying the case would consider the explanation that he was an innocent dupe to be reasonably compatible with the circumstances. However, such a tribunal would not be bound to take this view. It would be open to it to make a finding against the appellant beyond reasonable doubt upon the basis that only his guilt is reasonably compatible with the circumstances disclosed by this evidence. This means that a *prima facie* case has been established within the meaning of the Extradition Act.

Ichiyo Ujiie (Formerly named Kazuhiro Yashima) v. Republic of Singapore, Federal Court of Australia, 16 May 1996

Extradition - Requests for Extradition - Documentation - Whether strict compliance with Act and Treaty required - Prior Acquittal in the Requesting Country - Dual Criminality, mental element - Attorney-General's discretion - Extradition Act 1988 (Australia)

Argentina sought, pursuant to its extradition treaty with Australia, the extradition of Harris to face charges of drug smuggling. Harris challenged the issue of the Attorney-General's notice referring the matter to a court for determination of eligibility for surrender. The Magistrate and the first reviewing court found that Harris was eligible for surrender. He appealed to the Full Court of the Federal Court on the following grounds:

- (a) that the request did not comply with the Act and the Treaty;
- (b) that he had been acquitted of the offence for which surrender had been sought by a competent tribunal in Argentina;
- (c) the conduct of the appellant did not involve the mental element required by the provision of Australian law upon which dual criminality was found; and
- (d) the Attorney-General failed to give due weight to the discretion to refuse the surrender of nationals.

Held, dismissing the appeal

- (a) The Request

Substantial compliance with the provisions of the Treaty relating to supporting documents is a necessary and sufficient ingredient for the validity of a request. Technical objections as to matters of form will not be favourably considered.

On the issue whether the Attorney-General may issue a notice to a court of receipt of an extradition request before all the documents which must accompany an extradition request are received, the appropriate test is whether there is substantial compliance with Article 5, and if necessary Article 8, of the Treaty. (These articles deal with required documents and authentication). The material accompanying the request was sufficient to enable the Attorney-General to decide that "an extradition request" had been received because he was able to determine the issues required to be considered by him under s.16 as a pre-condition to the issue of a notice.

(b) Prior Acquittal

The extradition request revealed that a judicial inquiry in Argentina had determined that Harris should be absolved of the crime charged. Argentine law requires the state prosecutor to lodge an appeal against any resolution or sentence which is not entirely in accordance with what the prosecution had sought. Prior to the hearing of the appeal Harris, who was on bail, left Argentina. Contemporaneously the appeal was upheld by the appellate court and Harris was convicted and sentenced to five years imprisonment. Extradition was sought for the purpose of enforcing the remainder of this sentence. The appellant submits that surrender would place him in a double jeopardy situation. Where, as here, there is a mandatory appeal against an acquittal at first instance, it is at least open to question whether the proceedings at first instance should be described as "a completed course of legal proceedings". The present question is, in our view, to be resolved by reference to the laws of Argentina to which reference has been made. In other words, s.7(e) of the Australian Act must take the laws of that country as it finds them. At the time of the making of the request and at the time of the issue of the s.16(1) notice, the appellant was not, under the laws of Argentina, a person who had been "acquitted" of the extradition offence.

(c) Dual Criminality

It is not necessary to have complete identity between offences in the two countries: it is sufficient to have in substance a duality of criminality. It was submitted for the appellant that the conduct of the appellant did not involve the mental element required by s.233B of the Customs Act 1901 (Australia). In its essentials, s.233B relevantly provides that any person who attempts to import a prohibited import shall be guilty of an offence. The accused must know that he was importing a prohibited import but the existence of the requisite intention is a matter of fact; and that an inference of its existence may be drawn from the primary facts, where it is proved, beyond reasonable doubt, that the accused actually imported the drugs, and that he was then aware of the likelihood of the existence of the substance in question in what he was importing, and of the likelihood that it was a narcotic drug. The appellant contends that the Argentine Court made no finding that the appellant knew that the guitar contained the drug or that he was aware of the likelihood of the existence of cocaine within the guitar; so that, the argument runs, the ingredients of an offence under s.233B of the Customs Act were not present.

The appellant has not demonstrated that the element of dual criminality was not present here. On their face, the respective provisions are to the same effect, substantively speaking. In each instance, the adjectival question whether an inference should be drawn that the accused was aware that it was likely that he was importing narcotics will, no doubt, depend upon the circumstances of the case. But this is not to say that the substantive provisions are so different that a decision on dual criminality could not have been made by the Attorney-General before his notice was issued.

(d) Nationality

It is submitted, on behalf of the appellant, that, in deciding to issue the notice, the Attorney-General failed to give due weight to the discretionary factor that the appellant was a national of the Requested State as envisaged by Art. 3(2)(a) of the Treaty. Without expressing any opinion on the merits of the appellant's claim that the Attorney's discretion under s.16(1) miscarried, and in the absence of an exceptional situation of the kind

required to justify a civil court to intervene in the criminal process, we are of the view that, as a matter of discretion, this Court should not embark upon this branch of the appellant's argument. This is not, of course, to say that, at the s.22 stage [the final determination by the Attorney-General of whether or not to surrender] for instance, the grant of judicial review at that later point of time would not then be appropriate.

Mutual Assistance in Criminal Matters - Application to restrain making of a request - Executive powers to make requests for assistance in criminal matters - Offences under bankruptcy laws - Role of MA Treaties in municipal law - Mutual Assistance in Criminal Matters Act 1987 (Australia)

Facts

Australia and Switzerland have a treaty on mutual assistance in criminal matters. Section 10 of the Mutual Assistance in Criminal Matters Act 1987 (Aust.) gives to the Attorney-General power to make requests for assistance.

The request sought assistance in obtaining bank records, the issue and execution of search warrants upon the premises of the first applicant and the taking of evidence on oath from him. It related to the investigation of the second applicant for offences of perjury and other offences under the Australian Bankruptcy Act. The purpose of the request was to ascertain whether the second applicant had assets in Switzerland which he either failed to declare to the trustee in bankruptcy (an offence under the Bankruptcy Act) or whether he lied on oath during an examination of his financial affairs (an offence under the Crimes Act.)

Switzerland took action to execute the request and the applicants issued in that country numerous challenges to the exercise of coercive powers in Switzerland.

The Application

The applicants claim that the requests made by the Attorney-General were not authorised by the Mutual Assistance in Criminal Matters Act and are *ultra vires*, unauthorised by law and an abuse of power. The ground for this argument was that under sections 12 and 14 of the MA Act Australia could only make requests for the exercise of compulsory where proceedings had commenced and not where there was merely an investigation. In addition, they claim that the requests were not competent as a consequence of the annulment of the bankruptcy.

Held, dismissing the application

(a) Whether the requests were *ultra vires*:

A request on behalf of the executive government of Australia to a foreign country to obtain testimony or to seize or obtain documents in that country to assist an investigation into a criminal matter is entirely a matter for the executive government of Australia and the foreign country. If no Australian law forbids or prohibits the making of such a request it is a lawful request. The MA Act does not forbid, limit or circumscribe the requests for assistance which may be made by the Executive Government. Even though the requests made by the Attorney-General did not have specific legislative authorization they were not unlawful. (Section 6 of the Act provides, inter alia, that nothing in the Act prevents the

obtaining of assistance otherwise than as mentioned in this Act). Whether the Swiss authorities can lawfully use coercive power to comply with their obligations under the treaty is to be determined in accordance with Swiss law.

(b) Whether the making of the requests was an abuse of power:

The power of the Attorney-General to make requests given by s. 10 of the MA Act allows the making of requests for any form of assistance listed in s.5 of the Act and the making of requests under treaties. It also permits the making of requests when the preconditions for making requests under one of the specific request making powers cannot be met. The manifest intention of the legislature is that the Act should give effect to and not frustrate the operation of treaties. While a decision under s.10 to make a request is not immune from judicial review, the nature of the power, the unconfined discretion and the general scope and objects of the Act will severely confine the basis for judicial review.

(c) The Role of the Australia/Switzerland Treaty in Australian law

The Mutual Assistance in Criminal Matters (Switzerland) Regulations and s.7 of the Act only provide for the MA Act to apply to Switzerland "subject to such limitations, conditions, exceptions or qualifications" as are necessary to give effect to the Treaty. The Treaty is not enacted into Australian municipal law.

Jurg Bollag & Anor v. the Attorney-General of the Commonwealth & Anor, Federal Court of Australia, 30 October 1997

LEGISLATION

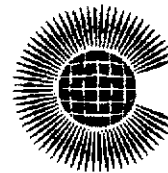
British Virgin Islands

The **Proceeds of Criminal Conduct Act 1997** makes provision for the recovery of the proceeds of all indictable offences other than drug trafficking offences. The Act empowers the court to make confiscation orders against offenders whom it considers to have benefitted from relevant criminal conduct. The court determines the amount to be recovered and requires payment of that amount. It also has power and jurisdiction to review and revise determinations including the power to receive fresh evidence with a view to making a new determination with respect to a confiscation order. In aid of the power to order confiscation the court may make restraining orders and may appoint a receiver to administer restrained property.

The Act also deals with **money laundering**. It established a reporting authority to receive suspicious transaction reports. It creates money laundering offences and a "tipping off offence" and it provides statutory protection to any person disclosing to the reporting authority a suspicion or belief that funds or investments are derived from or used in connection with criminal conduct.

The registration and enforcement of external confiscation, value and pecuniary penalty orders are provided for in the Act. Orders made in designated countries may be registered and enforced in the BVI. The Proceeds of Criminal Conduct Act was assented to on 9 October 1997 and comes into force on a date to be notified in the Gazette.

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Commonwealth Legal Assistance News - CLAN - is produced with the aim of providing assistance to law officers, central authorities and prosecutors who handle criminal cases which have an international aspect. With this issue we are conducting a survey to find your views on whether it has achieved this aim and to receive suggestions on how it could be improved. We would therefore be most grateful if you could take a few minutes to complete this questionnaire and return it to us.

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Index

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Please feel free to comment on any other aspect of this publication or on any way in which you believe the Commonwealth Secretariat Commercial Crime Unit can assist you in your work (use another sheet of paper if required).

Your position

Briefly describe your position (prosecutor, government policy lawyer, police, international civil servant) etc.